No. 73-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
Appellant,

v.

MICHAEL L. STONE, ET AL,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF AMICUS CURIAE OF BEHALF OF THE CITY OF CORPUS CHRISTI, TEXAS

JAMES R. RIGGS
City Attorney

JAMES F. McKIBBEN, JR.
Assistant City Attorney

P. O. Box 9277
Corpus Christi, Texas 78408

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

TABLE OF AUTHORITIES

Cases

No. 73-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
Appellant,

v.

MICHAEL L. STONE, ET AL,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF AMICUS CURIAE OF BEHALF OF THE CITY OF CORPUS CHRISTI, TEXAS

To The Honorable United States Supreme Court:

QUESTION PRESENTED

The following question is presented by this appeal:

> Are Texas election laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been rendered for taxation consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

INTEREST OF AMICUS CURIAE

The City of Corpus Christi is the primary defendant in a cause numbered 74-C-60 styled William O. Harrison, Jr., et al. v. The City of Corpus Christi, et al, presently pending before the United States District Court for the Southern District of Texas, Corpus Christi Division. Such cause is, in all respects, similar to the case at bar. The City of Corpus Christi filed a Motion to Intervene in the case at bar before the three-Judge District Court. Said Motion was denied.

In the cause pending in the United States District Court for the Southern District of Texas, Corpus Christi Division, the City Council submitted nine separate bond propositions for voter approval on December 9, 1972. The election was conducted as two separate but simultaneous elections as was the Fort Worth election in the case at bar and as instructed by the Attorney General of Texas. All propositions passed property owners, non-property renderers, and total vote with the exception of Proposition Two (the Convention Center Proposition) which vote was as follows:

OWNERS OF PROPERTY RENDERED FOR TAXATION	
FOR	7,705
AGAINST	7,810
NON-RENDERERS	
FOR	1,601
AGAINST	820
TOTAL FOR	9,306
TOTAL AGAINST	8,630

The result is that the Convention Center Bonds will be approved for sale only if the non-rendering voters were

constitutionally entitled to vote and have their vote counted equally with rendering property owners despite Texas and Corpus Christi laws to the contrary.

This brief is filed for the City of Corpus Christi, Texas, a municipal corporation, home-rule city, and political subdivision of the State of Texas, sponsored by its authorized law officer, the City Attorney, as provided in Supreme Court Rule 42 (4).

ARGUMENT

A. The Texas Laws in Question Violate the United States Constitution's Equal Protection Clause

This Court has held as invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Stewart* v. *Parish School Board of St. Charles Parish*, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 844 (1970).

In *Kramer*, this Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools.

The *Cipriano* decision invalidated a Louisiana statute which permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. In *Phoenix*, this Court held that an Arizona constitutional limitation of the franchise in general obligation bond elections to persons who were qualified electors and also real

property taxpayers was in violation of the Equal Protection Clause. In *Stewart,* the three-judge District Court abrogated Louisiana statutes which restricted eligibility to vote in tax bond elections to property taxpayers and also weighted each elector's vote by the monetary value of his assessed property. *Stewart* (supra) was affirmed by this Court.

In *Cipriano, Phoenix,* and *Stewart,* the arguments were made that there was a compelling state interest in limiting the franchise to those that were primarily interested, i.e., taxpayers, or that there was a rational basis for the limitation, i.e., limiting the decision to those whose property would be taxed to retire the indebtedness. The premise of the argument is that persons who are not property taxpayers would be irresponsible or extravagant in incurring or approving indebtedness for others to pay. In each of the three cases, however, the bonds were approved by those limited holders of the franchise and in each the Court found an Equal Protection violation and enjoined the bond sales.

It would seem that the requirement of unlimited franchise is absolute when viewed in light of the facts in *Cipriano, Phoenix,* and *Stewart.* Certainly the fear of irresponsible or uninformed approval was not present. To try to maintain the "primarily interested" requirement in light of *Phoenix* becomes a non sequitur. Since the Court has invalidated elections where those "primarily interested" voted approval, must it logically be concluded that bond elections approved by all voters conform to the requirements of the Equal Protection Clause?

In fact, the Attorney General of Texas' approval of bonds for sale under the dual-box policy is limited to situations where the bonds ". . . have been approved not only

by the owners of taxable property duly rendered, voting in a separate box, but also by the aggregate of all electors." (Appellants Brief p. 10.) Those who have not been fully enfranchised by the action of the Tax Assessor-Collector or their own action in rendering property, apparently have a negative vote franchise but not an affirmative vote franchise. Is there a rational basis for giving those not "primarily interested" the power to veto public projects and denying them a vote in favor of public projects? This possibility would seem to encourage those who wish to escape their share of the tax burden to fail to render their property and retain the authority to prevent public expenditures. As pointed out aptly in Appellees Brief the rationale of encouraging rendition is not supported by noticeable increases in personal property renditions nor by rendering a pencil as assumption of a fair share of the tax burden.

B. The Decision of the District Court Should Apply in All Texas Cases Arising After June 23, 1970 in Which the Dual-Box Election Procedure Was Followed and Where the Bonds Have Not Been Sold.

In many cases this Court has applied *new rules* prospectively. (emphasis added.) The real question if the Court affirms the District Court is whether or not in light of *Cipriano* and *Phoenix* this is a new rule.

Texas was one of fourteen states restricting the franchise at the time of the *Phoenix* decision, June 23, 1970.

> Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. *Phoenix* v. *Kolodziejski*, 399 U.S. 204-213 (1970)

The Attorney General of Texas instituted the dual-box election procedure and began validation of bonds approved

by owners of taxable property duly rendered, voting in a separate box, and also by the aggregate of all electors. There is not presented in this case the problem of retroactivity disrupting previously issued bonds. That valid contractual concern was properly dealt with in *Cipriano* and *Phoenix*.

The situation posed if the Court affirms the District Court is whether the decision should apply retroactively to June 23, 1970, on those cases where the bonds were approved by the aggregate of all electors but not by the owners of taxable property duly rendered, whether the decision should apply in the case at bar and other pending litigation to require the sale of bonds; or whether the decision should only apply prospectively and in the case at bar as announced by the District Court.

This Court after a lengthy discussion of retroactivity and noting that at common law there was no authority for the proposition that judicial decisions made law only for the future has stated

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. . . .
>
> *Linkletter* v. *Walker* 381 U.S. 618, 629 (1965)

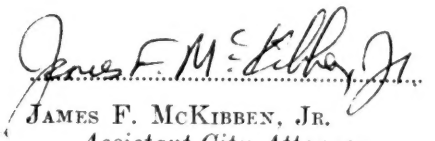
It is submitted that the merits of this issue before the Court weigh in favor of an application of the decision retrospectively at least to the extent of challenges pending or available at the time of this Court's decision. This result would further the purpose of the standards announced by this Court.

CONCLUSION

For the reasons stated the decision of the three-judge District Court that the Texas laws in question violate the U. S. Constitution's Equal Protection Clause should be affirmed; however, the judgment of that Court should be modified to make it applicable to the Corpus Christi case and like cases pending in which the dual-box election procedure was followed.

Respectfully submitted,

JAMES R. RIGGS, *City Attorney*
City of Corpus Christi



JAMES F. MCKIBBEN, JR.
Assistant City Attorney
P. O. Box 9277
Corpus Christi, Texas 78408

CERTIFICATE OF SERVICE

I, James F. McKibben, Jr., as of counsel for Amicus Curiae herein named and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Amicus Curiae Brief have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, Attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid to John L. Hill, Attorney General of Texas, Larry F. York, First Assistant Attorney General, Mike Willatt, Assistant Attorney General, and G. Charles Kobdish, Assistant Attorney General, Attorneys for Appellant, State of Texas, at Box 12548, Capitol Station, Austin, Texas 78711. I further certify that I also placed three copies in the mail, first class postage prepaid to Marshall Boykin III at 2000 Bank & Trust Tower, B & T 249, Corpus Christi, Texas 78477. All parties required to be served have been served.

Witness my hand this 27 day of December, 1974.

James F. McKibben, Jr.

James F. McKibben, Jr.
P. O. Box 9277
Corpus Christi, Texas 78408